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 25 NETLIST, INC.

26 UNITED STATES DISTRICT COURT
 27 NORTHERN DISTRICT OF CALIFORNIA
 28 (OAKLAND DIVISION)

29 GOOGLE INC.,
 30 Plaintiff,
 31 v.
 32 NETLIST, INC.,
 33 Defendant.

Case No. C 08-04144 SBA

**JOINT CASE MANAGEMENT
 CONFERENCE STATEMENT AND
 [PROPOSED] ORDER**

Date: February 12, 2009
 Time: 3:15 p.m.
 Dept.: Telephonic

34 AND RELATED COUNTERCLAIMS.

1 Google Inc. ("Google") and Netlist, Inc. ("Netlist") hereby respectfully submit the
2 following Joint Case Management Conference Statement and Proposed Order.

3 **1. Jurisdiction and Service**

4 This is an action arising under the patent laws of the United States, Title 35, United States
5 Code. This Court has jurisdiction over the claims and defenses of this action pursuant to 35
6 U.S.C. § 1 *et seq.*, and 28 U.S.C. §§ 1331, 1338(a), 2201, and 2202. The parties do not believe
7 that any jurisdiction or venue issues exist at this time. No parties remain to be served.

8 **2. A Brief Description of the Events Underlying the Action**

9 Netlist is listed with the United States Patent and Trademark Office ("USPTO") as the
10 assignee of record of U.S. Patent No. 7,289,386 ("the '386 patent"). In May of 2008, Netlist sent
11 Google a letter asserting ownership of the '386 patent and alleging that Google was infringing the
12 patent by using technology covered by the '386 patent in its servers. The technology related to
13 memory modules used in the server memory. Netlist's outside counsel sent additional letters to
14 Google in June of 2008 reiterating its allegations. On August 29, 2008, Google initiated this
15 action for declaratory judgment of non-infringement and invalidity of the '386 patent; Netlist then
16 counterclaimed for patent infringement and related claims.

17 **3. Principal Factual Issues Disputed by the Parties**

18 Whether Google has infringed the '386 patent; and
19 Appropriate damages and equitable relief for any infringement.

20 **4. Principal Legal Issues Disputed by the Parties**

- 21 • Claim construction of terms in the '386 patent;
22 • Whether any or all claims of the '386 patent are invalid under 35 U.S.C. §§ 101,
23 102, 103, or 112;
24 • Whether the '386 patent is unenforceable;
25 • Whether the claims set forth in Netlist's counterclaims are barred by waiver;
26 • Whether the claims set forth in Google's complaint are barred by waiver;

- 1 • Whether the claims set forth in Netlist's counterclaims are barred by Netlist's
- 2 unclean hands;
- 3 • Whether the claims set forth in Google's complaint are barred by Google's unclean
- 4 hands;
- 5 • Whether the claims set forth in Netlist's counterclaims are barred by estoppel;
- 6 • Whether the claims set forth in Google's complaint are barred by estoppel;
- 7 • Whether the Court should declare the case exceptional under 35 U.S.C. § 285 and
- 8 award attorneys fees to the prevailing party; and
- 9 • Whether and what relief should be granted.

10 **5. Motions**

11 There have been no prior motions. No motions are currently pending. Both Google and
12 Netlist anticipate filing motions for summary judgment and, to the extent it becomes necessary,
13 motions relating to discovery.

14 **6. Amendment of Pleadings**

15 The parties may amend their claims and defenses as discovery progresses, but do not plan
16 to add or dismiss claims at this time.

17 **7. Evidence Preservation**

18 The parties' proposal for document preservation is described in Section 8, below.

19 **8. Disclosures**

20 The parties will exchange the information required by Fed. R. Civ. Proc. 26(a)(1) by
21 February 5, 2009.

22 **9. Discovery**

23 **A. Discovery Schedule**

24 No formal discovery has been taken to date. The parties' proposed dates for the
25 completion of fact and expert discovery are provided in Section 18 below.

26 **B. Discovery Limits**

27 The parties agree to the following limits on discovery.

1 Discovery and Form of Production – Google’s Proposal: The parties agree to exchange
2 electronic discovery as single-page TIFF images with corresponding load files.

3 Discovery and Form of Production – Netlist’s Proposal: The parties agree to exchange
4 electronic discovery as native-format files for common (e.g., Microsoft Office) applications, and
5 for other applications, single-page TIFF images with corresponding load files. The parties shall
6 meet and confer to distinguish common from unusual applications based on the applications at
7 issue for each party.

8 Explanation Regarding the Parties’ Different Proposals for Discovery and Form of
9 Production: Google and Netlist have been unable to agree on a format and process for electronic
10 document production for the following reasons. Google’s position is that document collection and
11 production can be managed more efficiently and cost-effectively if single-page TIFF images are
12 used. Google also feels that discovery will be more efficient if the parties simply use a standard
13 format for all documents, rather than meeting and conferring to identify “common applications.”

14 Netlist believes that using native format for standard applications will be significantly less
15 expensive for the parties and will obviate the need for cumbersome databases containing TIFF
16 files. In addition, using native format guarantees that relevant metadata and revision history
17 information is maintained in the documents produced by the parties. Netlist suggests that the
18 parties should meet and confer further on this issue, because this question is one that should not
19 need Court intervention.

20 Assertion of Privilege After Production: The inadvertent production of any privileged
21 material shall not be deemed a waiver of any claim of privilege of the information. Upon
22 receiving oral or written notice from the Producing Party that privileged material has been
23 inadvertently produced, all such privileged material and any copies thereof shall immediately be
24 returned to the Producing Party and the receiving party shall not use any such privileged material
25 or privileged information therein for any purpose absent further Order of this Court.

26 **10. Class Actions**

27 This case is not currently a class action.

1 **11. Related Cases**

2 There are no related cases.

3 **12. Relief**

4 Google seeks the following relief:

- 5 • A declaration that Google does not infringe any valid and enforceable claim of the
- 6 '386 patent;
- 7 • A declaration that the '386 patent is invalid and unenforceable;
- 8 • A declaration that this case is exceptional under 35 U.S.C. § 285 and an award of
- 9 its costs, disbursements, and attorney fees in connection with this case under 35
- 10 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- 11 • Any other and further relief that this Court deems just, reasonable, and proper.

12 Netlist seeks the following relief:

- 13 • A judgment that Google has infringed the '386 patent;
- 14 • A finding that such infringement was willful and deliberate;
- 15 • Monetary damages and injunctive relief based on such infringement;
- 16 • A finding that this case is exceptional under 35 U.S.C. § 285 and an award of its
- 17 costs, disbursements, and attorney fees in connection with this case under 35
- 18 U.S.C. § 285 and any other authority deemed appropriate by the Court; and
- 19 • Any other and further relief that this Court deems just, reasonable, and proper.

20 **13. Settlement and ADR**

21 The parties have met and conferred in compliance with ADR L.R. 3-5 and reached a
22 stipulation pursuant to Civil L.R. 16-8 and ADR L.R. 3-5 to participate in private mediation. The
23 parties filed this stipulation with the Court on December 12, 2008. Currently, the parties
24 anticipate holding a mediation with Anthony Piazza on March 13, 2009. The deadline for private
25 mediation is March 17, 2009.

26 **14. Consent to Magistrate Judge For All Purposes**

27 A declination to proceed before a United States Magistrate Judge was filed in this matter.

1 **15. Other References**

2 The parties do not believe that this case is suitable for reference to binding arbitration, a
3 special master, or the Judicial Panel on Multidistrict Litigation.

4 **16. Narrowing of Issues**

5 While the parties may reach or agreements or file dispositive motions narrowing the issues
6 in this case, it is premature at this time to determine the number and/or subject matter of any such
7 agreements or motions.

8 **17. Expedited Schedule**

9 The parties' proposed schedule can be found below. The parties do not believe there is any
10 need for an expedited schedule.

11 **18. Scheduling**

12 The parties propose that the Court adopt the following schedule.

Case Event	Date
Parties will establish agreed-upon procedures for production of documents (Pat. L.R. 3-2)	February 12, 2009
Preliminary Infringement Contentions (Pat. L.R. 3-1, 3-2)	February 26, 2009 ¹
Preliminary Invalidity Contentions (Pat. L.R. 3-3, 3-4)	April 13, 2009
Exchange Proposed Terms for Claim Construction (Pat. L.R. 4-1)	April 23, 2009
Exchange Preliminary Claim Constructions and Extrinsic Evidence (Pat. L.R. 4-2)	May 25, 2009
Joint Claim Construction and Prehearing Statement (Pat. L.R. 4-3)	June 12, 2009
End of Claim Construction Discovery (Pat. L.R. 4-4)	July 20, 2009
Netlist serves Opening Claim Construction Brief (Pat. L.R. 4-5 and by stipulation of parties)	July 28, 2009
Google serves Responsive Claim Construction Brief (Pat. L.R. 4-5)	August 25, 2009

27 ¹ Defendant Netlist has indicated objection to this date, and requests a date for the Preliminary
28 Infringement Contentions after the mediation on March 13, 2009. This request is not acceptable to Plaintiff Google.

Case Event	Date
Netlist serves Reply Claim Construction Brief (Pat. L.R. 4-5)	September 22, 2009
Tutorial	(Convenience of the Court)
<i>Markman</i> Hearing	(Convenience of the Court)
Case Management Conference Following <i>Markman</i> Ruling	(Convenience of the Court)

19. Trial

This case will be tried before a jury.

The parties request a trial date in the first quarter of 2010.

The parties expect that the trial will last for 7-9 days.

20. Disclosure of Non-party Interested Entities or Persons

Both Google and Netlist have filed the "Certification of Interested Entities or Persons" required by Civil L.R. 3-16. No non-party interested entities or persons exist at this time.

21. Other issues

At this time, the parties are not aware of any other issues that may facilitate the just, speedy and inexpensive disposition of this matter.

Dated: February 2, 2009

FISH & RICHARDSON P.C.

By: /s/ David J. Miclean
David J. Miclean

Attorneys for Plaintiff
GOOGLE INC.

1 Dated: February 2, 2009

MORRISON & FOERSTER LLP

2
3
4 By: /s/ L. Scott Oliver

James Pooley
L. Scott Oliver

5
6 Attorneys for Defendant
NETLIST, INC.

7
8
9 **DECLARATION OF CONSENT**

10 Pursuant to General Order No. 45, Section X(B) regarding signatures, I attest under
11 penalty of perjury that concurrence in the filing of this document has been obtained from L. Scott
12 Oliver.

13 Dated: February 2, 2009

FISH & RICHARDSON P.C.

14
15 By: /s/ David J. Miclean

David J. Miclean

16
17 Attorneys for Plaintiff
GOOGLE INC.

18
19
20 IT IS SO ORDERED.

21
22 Dated: _____

UNITED STATES DISTRICT JUDGE

23
24 #50633143